Supreme Court, U.S.
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No. 99-_____

In The

Supreme Court of the United States

October Term, 1999

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MOODY HILL FARMS LIMITED PARTNERSHIP, DOUGLAS DURST, SUSANNE DURST, RAYMOND MCENROE, FRANK S. PEROTTI, and DORIS PEROTTI,

Plaintiffs-Appellees,

– against –

UNITED STATES DEPARTMENT OF THE INTERIOR, NATIONAL PARKS SERVICE,

Defendant-Appellant.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

GARY M. ROSENBERG
Counsel of Record
JEFFREY TURKEL

ROSENBERG & ESTIS, P.C.
Attorneys for Plaintiffs-Appellees
733 Third Avenue
New York, New York 10017
(212) 867-6000

SW

St. Louis West, Inc. (8003)
NY (212) 684-3117 NJ (201) 863-8133
Printed on Recycled Paper

QUESTION PRESENTED

Where a State has enacted an approved State Historic Preservation Program, does the Keeper of the National Register have independent authority under the National Historic Preservation Act to add a property in that State to the National Register where (1) the predicate State nomination has been annulled in a State court proceeding, and (2) the State Board in charge of historic preservation has thereafter declined to re-nominate the property?

PARTIES TO THE PROCEEDING

There are no other parties to the proceeding other than those named in the caption.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF CITATIONS	v
OPINIONS BELOW	2
STATEMENT OF JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	7
A. State Proceedings	7
B. Federal Proceedings	9
REASONS FOR GRANTING THE WRIT	13
I. THE KEEPER VIOLATED THE APPLICABLE STATUTE AND REGULATIONS BY EXCEEDING HER AUTHORITY AND BY DEPRIVING NEW YORK STATE OF CONGRESSIONALLY MANDATED PARTICIPATION IN THE LISTING PROCESS	13
A. The Keeper's Limited Authority	14

	Page
B. State Participation In The Listing Process..	15
C. The Court Of Appeals Impermissibly Expanded The Keeper's Role And Deprived New York State Of Meaningful Participation In The Nomination Process ..	19
CONCLUSION.....	25

TABLE OF CITATIONS

Page

Cases:

Stop H-3 Association v. Coleman,
533 F.2d 434 (9th Cir. 1976). .20 22

Statutes:

5 U.S.C. § 701 et seq..... 10

16 U.S.C. § 470 et seq..... 2, 13

16 U.S.C. § 470(b)(7) 15

16 U.S.C. § 470a(a)(1)(A)..... 2, 13

16 U.S.C. § 470a(b) et seq ..... 3, 7n.

16 U.S.C. § 470a(b)(1)..... 17

28 U.S.C. § 1254(1)..... 2

36 C.F.R § 60.1(b)..... 5, 14

36 C.F.R § 60.1(b)(1) 14

36 C.F.R. § 60.1(b)(2)..... 14, 21

Page

36 C.F.R. § 60.1(b)(3).....15, 19, 21

36 C.F.R § 60.1(b)(4) 15, 21

36 C.F.R § 60.1(b)(5) 14, 21

36 C.F.R. § 60.6..... 4, 18

36 C.F.R. § 60.6(l) 21

36 C.F.R. 60.15 ..... 6, 9, 23

36 C.F.R. § 60.15(a)(4)..... 9, 23

Act of Dec. 12, 1980, P.L. 96-515, 94 Stat. 2987.. 2, 15

U.S. Code Cong'l & Admin. News, 96th Cong., 2nd Sess., at p. 6386 17

U.S. Code Cong'l & Admin. News, 96th Cong., 2nd Sess., at p. 6392..... 18

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Plaintiffs-appellees, Moody Hill Farms Limited Partnership, Douglas Durst, Susanne Durst, Raymond McEnroe, Frank S. Perotti and Doris Perotti (the "plaintiffs"), respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit has not yet been officially reported, but can be found at 1999 U.S. App. Lexis 7543. In addition, the opinion is reprinted in the appendix ("App.") at 1a. The opinion of the District Court, 95 Civ. 11001 (RWS), is reported at 976 F. Supp. 214 (S.D.N.Y. 1997) and is reprinted at App. 18a. The August 18, 1995 determination of defendant-appellant United States Department of the Interior, National Park Service ("the defendant") is not reported and is reprinted at App. 45a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit ("Court of Appeals") was entered on April 20, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The National Historic Preservation Act of 1966 (codified at 16 U.S.C. § 470 et seq.) generally empowered the Secretary of the Interior to "expand and maintain a National Register of Historic Places." Id. at 470a(a)(1)(A). The Act was thereafter amended pursuant to the National Historic Preservation Act Amendments of 1980 (the "1980 Amendments") (Act of Dec. 12, 1980, P.L. 96-515, 94 Stat. 2987). One of the main purposes of the 1980 Amendments was to strengthen State participation in the National Register listing process by establishing standards for approved State Historic Preservation Programs. Section

101(b) of the 1980 Amendments (codified at 16 U.S.C. § 470a(b) et seq.) provides in relevant part:

> "(1) The Secretary, in consultation with the National Conference of State Historic Preservation Officers and the National Trust for Historic Preservation, shall promulgate or revise regulations for State Historic Preservation Programs. Such regulations shall provide that a State program submitted to the Secretary under this section shall be approved by the Secretary if he determines that the program -
>
> (A) provides for the designation and appointment by the Governor of a 'State Historic Preservation Officer' to administer such program in accordance with paragraph (3) and for the employment or appointment by such officer of such professionally qualified staff as may be necessary for such purposes;
>
> (B) provides for an adequate and qualified State historic preservation review board designated by the State Historic Preservation Officer unless otherwise provided for by State law and

(C) provides for adequate public participation in the State Historic Preservation Program, including the process of recommending properties for nomination to the National Register."

36 C.F.R. § 60.6 further clarifies the State's role in the National Register listing process and provides in relevant part:

"(a) The State Historic Preservation Officer is responsible for identifying and nominating eligible properties to the National Register. Nomination forms are prepared under the supervision of the State Historic Preservation Officer. The State Historic Preservation Officer establishes statewide priorities for preparation and submittal of nominations for all properties meeting National Register criteria for evaluation within the State. All nominations from the State shall be submitted in accord with the State priorities, which shall be consistent with an approved State historic preservation plan.

(b) The State shall consult with local authorities in the nomination process" (emphasis supplied).

The five mechanisms for adding properties to the National Register are set forth in 36 C.F.R. § 60.1(b), which states in its entirety:

> "Properties are added to the National Register through the following processes.
>
> (1) Those Acts of Congress and Executive orders which create historic areas of the National Park System administered by the National Park Service, all or portions of which may be determined to be of historic significance consistent with the intent of Congress;
>
> (2) Properties declared by the Secretary of the Interior to be of national significance and designated as National Historic Landmarks;
>
> (3) Nominations prepared under approved State Historic Preservation Programs, submitted by the State Historic Preservation Officer and approved by the NPS;
>
> (4) Nominations from any person or local government (only if such property is located in a State with no approved State Historic Preservation Program) approved by the NPS and;

(5) Nominations of Federal properties prepared by Federal agencies, submitted by the Federal Preservation Officer and approved by NPS."

The grounds for de-listing properties are set forth in 36 C.F.R. 60.15, which states in relevant part:

"(a) Grounds for removing properties from the National Register are as follows:

* * *

(4) Prejudicial procedural error in the nomination or listing process. Properties removed from the National Register for procedural error shall be reconsidered for listing by the Keeper after correction of the error or errors by the State Historic Preservation Officer, Federal Preservation Officer, person or local government which originally nominated the property, or by the Keeper as appropriate."

STATEMENT OF THE CASE

This is a case of first impression. The National Historic Preservation Act of 1966, as amended, contemplated that States with an approved State Historic Registration Program (such as New York State) would be a "full partner" with the Keeper with respect to the National Register listing process. Notwithstanding Congress's intent, the Court of Appeals herein ruled that the Keeper has independent authority to list properties in such States on the National Register, and was free to list the subject property even though the predicate State nomination had been annulled, and New York State had thereafter refused to re-nominate the property to the State Register.

A. State Proceedings

Coleman Station is a hamlet in the Town of Northeast in Dutchess County, New York. The plaintiffs are either associated with Moody Hill Farms Limited Partnership, which operates an organic farm and composting facility on property within Coleman Station, or own farms within or adjacent to Coleman Station.

In February of 1993, several local residents submitted an application to the New York State Office of Parks, Recreation and Historic Preservation ("NYHP")[1], seeking to nominate Coleman Station to the National Register and the New York

---

[1] NYHP is New York State's approved Historic Preservation Program under the National Historic Preservation Act of 1966, as amended. See, 16 U.S.C. § 470a(b).

State Register of Historic Places. These residents made no secret of their opposition to Moody Hill Farm's composting activities. The plaintiffs opposed the application, asserting that Coleman Station did not meet the standards and criteria for the proposed listings.

On June 8, 1993, the New York State Review Board for Historic Preservation ("the Board") voted to nominate Coleman Station for listing on the State and National Registers, and forwarded its determination to NYHP. On August 12, 1993, the Deputy Commissioner of NYHP approved Coleman Station -- without written opinion -- for listing on the State Register and forwarded the nomination to the Keeper of the National Register of Historic Places ("the Keeper") the same day.

The plaintiffs thereafter commenced a proceeding under New York State law to annul NYHP's order on various substantive and procedural grounds. In a decision dated June 29, 1994, the New York State Supreme Court (Beisner, J.) annulled the administrative determination and vitiated the State listing based upon NYHP's failure to comply with State regulations requiring (1) timely notice of the determination, and (2) a written finding of support. App. at 40a.

On August 19, 1994, NYHP informed the plaintiffs that it was reconsidering the nomination of Coleman Station for both the State and National Registers. The plaintiffs objected to the listing, once again arguing that Coleman Station did not meet the standards and criteria for inclusion on the State or National Registers.

What the plaintiffs did not know at this time was that the Keeper had listed Coleman Station on the National Register on September 30, 1993, and had notified NYHP of this fact the same day. It would not be until December 30, 1994 -- fourteen months later -- that NYHP would notify the plaintiffs of the national listing.

Notably, the Keeper, when listing Coleman Station on the National Register, made no independent finding that the property was eligible for listing. The Keeper merely certified that "this property is entered in the National Register." The Keeper explicitly failed to check off the box certifying that the property is "determined eligible for the National Register." The Keeper's determination to list Coleman Station in the National Register was little more than a rubber stamp of the State listing, which, in turn, contained no written opinion as to the property's eligibility.

At a February 2, 1995 hearing, the Board tabled a motion to re-nominate Coleman Station for state listing. The district has never been subsequently re-nominated.

B. Federal Proceedings

On February 28, 1995, the plaintiffs petitioned the Keeper pursuant to 36 C.F.R. § 60.15 to remove Coleman Station from the National Register. As is relevant herein, the plaintiffs asserted that the National Register listing was voided by the New York State Supreme Court's annulment of the State Register listing and NYHP's subsequent failure to re-nominate the district to the State Register. The plaintiffs specifically cited 36 C.F.R. § 60.15 (a)(4), which authorizes the Keeper to de-list

a property based on "[p]rejudicial procedural error in the nomination or listing process."

On August 18, 1995, the Keeper denied the petition for removal. In response to the plaintiffs' argument that the State court annulment had vitiated the predicate State nomination, the Keeper ruled:

> "[W]e do not understand [the State Court determination] to conclude that the State listing violated due process rights. Rather, the opinion expressly concludes that the State listing process was invalid only because the State failed to notify the property owners of the listing within 45 days of the listing as required by 9 NYCRR 427.5(f)(1) and that the State failed to make an administrative finding as required by 9 NYCRR 427.5(d)" (material in brackets supplied).

App. at 47a.

The plaintiffs thereafter commenced the underlying federal action under the Administrative Procedure Act, 5 U.S.C. § 701 et seq., challenging the Keeper's denial of the plaintiffs' petition for removal. In a determination dated September 4, 1997, the District Court (Sweet, U.S.D.J.) held that the Keeper's denial was arbitrary and capricious. As is relevant herein, the Court stated:

> "... a nomination to the National Register does not proceed unless either the State Agency Officer or Board find that it meets federal

> criteria. If that finding is disputed, the State Officer must submit a written opinion on eligibility.
>
> In the instant case, the Assistant Commissioner of the NYHP listed the district on the State Register and forwarded the nomination to the National Register on the same day, certifying as to its eligibility by signing the application form. As a result of the State Court proceeding, the nomination to the State Register became void ab initio. Subsequently, the NYHP decided not to re-nominate the district for the State Register. Implicit in this decision is the determination that the district does not meet the criteria for the State Register. Because the criteria for State and National Registers are identical, eligibility for National Register is also refuted. Thus the certification of eligibility to the National Register, which resulted from the original nomination of the district, appears to have been voided by the State Court annulment, and was not re-established thereafter."

App. at 37a-38a.

The defendant thereafter appealed to the Second Circuit. In a determination dated April 20, 1999, the Court of Appeals reversed the District Court, stating in relevant part:

> "Where a nomination comes through a state historic preservation program, the regulations

reserve final authority for the Park Service to determine whether the property will be added to the National Register. This reservation, combined with the Secretary of the Interior's power to name a property for the listing sua sponte, strongly supports the inference that the Keeper has independent authority to determine whether the property should be listed, even where a nomination initially comes through a state preservation program.

* * *

"... these regulations establish a comprehensive set of procedural requirements that must be met for a property to be listed on the National Register upon the nomination of a state preservation program. However, nowhere in the regulations is a requirement that state preservation programs also comply with state procedural requirements regarding nominations of properties for the national register. Although prejudicial error in the nomination or listing process is a ground for removal from the national register, see, 36 C.F.R. § 60.15, we read this provision as relating to errors in the national nomination or listing process, not errors in the state nomination process" (emphasis in original).

App. at 9a, 14a.

REASONS FOR GRANTING THE WRIT

I

THE KEEPER VIOLATED THE APPLICABLE STATUTE AND REGULATIONS BY EXCEEDING HER AUTHORITY AND BY DEPRIVING NEW YORK STATE OF CONGRESSIONALLY MANDATED PARTICIPATION IN THE LISTING PROCESS

In the instant case, the Keeper refused to de-list Coleman Station from the National Register even though (1) NYHP's predicate nomination was without opinion; (2) NYHP's nomination had been annulled by a New York State court, and (3) the New York State Review Board for Historical Preservation thereafter failed to re-nominate Coleman Station. The Court of Appeals, reversing the District Court, affirmed this result, finding that the Keeper had "independent authority to determine the eligibility of properties to add to the National Register," notwithstanding the State annulment. App. at 8a.

The plaintiffs respectfully submit that the Court of Appeals has grievously misinterpreted the applicable statute and regulations to the detriment of New York State, and that a grant of certiorari is warranted.

The National Historic Preservation Act of 1966 (16 U.S.C. § 470 et seq.) authorized the Secretary of the Interior to expand and maintain a National Register of Historic Places consisting of "districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture." Id.,§ 470a(a)(1)(A). A review of the

statute and the implementing regulations establishes that (1) the Keeper's power to add a property to the National Register is sharply circumscribed, and (2) States (such as New York State) which have created an approved State Historic Preservation Program ("Program") were to be treated as a "full partner" in the listing process, with due regard given to the State's preservation and political concerns. Notwithstanding Congress's mandate, the Court of Appeals herein dramatically expanded the Keeper's power, and deprived New York State of meaningful participation in the listing process.

A. The Keeper's Limited Authority

The five methods of adding properties to the National Register are set forth in 36 C.F.R. § 60.1(b), which section is quoted in full at pp. 3-4, supra.

The first method, subsection (1) of § 60.1(b), invests no authority or discretion in the Keeper. If Congress or the Executive directs that a historic district be created, the Keeper is compelled to add that property to the National Register.

Subsection (2) permits the Secretary of the Interior -- **not** the Keeper -- to declare any property to be of national significance. Again, the Keeper's sole function in such instances is to list the property on the National Register.

The remaining three subsections all grant the Keeper (acting on behalf of the National Park Service) substantive discretion as to which properties should be listed, provided, however, that the nomination comes to the Keeper from an authorized source. For federal properties, the nomination must be submitted by the Federal Preservation Officer. 36 C.F.R. §

60.1(b)(5). For State property, a distinction is made depending on whether or not the State has enacted an approved Program. If it has, the nomination must be made by the State Historic Preservation Officer. Id., § 60.1(b)(3). If not, the nomination can be made by "any person or local government." Id., § 60.1(b)(4). If a nomination is not properly forwarded to the Keeper, the Keeper is deprived of jurisdiction and is powerless to act.

B. State Participation In The Listing Process

When Congress enacted the National Historic Preservation Act of 1966, it declared that it was "necessary and appropriate for the Federal Government ... to assist State and local governments ... to expand and accelerate their historic preservation programs and activities." 16 U.S.C. § 470(b)(7). By 1980, however, Congress recognized that State participation in the National Register listing process remained minimal. As a result, Congress passed the National Historic Preservation Act Amendments of 1980. (Act of Dec. 12, 1980, P.L. 96-515, 94 Stat. 2987.) The legislative history of the 1980 Amendments establishes Congress's intent to make States with an approved Program a "full partner" in the National Register listing process:

> "*State programs.* -- Since enactment of the National Historic Preservation Act of 1966, the State programs have greatly matured, yet their authorities under the Federal legislation have remained minimal. In 1966, there were almost no statewide historic preservation programs; today, they are in place in every State and six territories.

The State programs are key to implementation of the 1966 Act. The State Historic Preservation Officer (SHPO), designated by the Governor, is responsible for statewide historic preservation surveys, inventories and plans, for nominations to the National Register and for administration of the grants program within the State. The SHPO also provides many professional services to other Federal, State and local agencies, including review of Federal undertakings for compliance with Section 106 of the National Historic Preservation Act. Each SHPO has the assistance of full-time professional staff and a State historic preservation review board.

Despite the increased responsibilities placed on them, and despite the growth in their professional capabilities and experience, the States have not been treated as the full 'partner' in the Federal program, envisioned by the Congress in the 1966 Act. Lacking a statutory base for their programs, the States have been operating under various Federal regulations and subject to changing Administration priorities. H.R. 5496 would remedy this by establishing the basic requirements for an approved State program and by providing more authority to the States for administration of the national program" (emphasis supplied).

U.S. Code Cong'l and Admin. News, 96th Cong., 2d Sess., at p. 6386.

Pursuant to Section 101(b) of the 1980 Amendments (as codified at 16 U.S.C. § 470a(b)(1)), a Program shall be approved if it:

> "(A) provides for the designation and appointment by the Governor of a 'State Historic Preservation Officer' to administer such program in accordance with paragraph (3) and for the employment or appointment by such officer of such professionally qualified staff as may be necessary for such purposes;
>
> (B) provides for an adequate and qualified State historic preservation review board designated by the State Historic Preservation Officer unless otherwise provided for by State law and
>
> (C) provides for adequate public participation in the State Historic Preservation Program, including the process of recommending properties for nomination to the National Register."

The legislative history of the 1980 Amendments establishes that the purpose of the above-quoted section was to:

> " . . . clarify and reinforce the relationship and respective responsibilities of the Federal and State programs. States which meet the minimum requirements for the program, including the duties listed for the State Historic Preservation Officers and establishment of a mechanism to certify local governments, would be given more authority for administering historic preservation programs within their States" (emphasis supplied).

U.S. Code Cong'l and Admin. News, 96th Cong., 2d Sess., at p. 6392.

The implementing regulations further define the State's significant and discretionary role in the nomination process. 36 C.F.R. § 60.6 provides in relevant part:

> "(a) The State Historic Preservation Officer is responsible for identifying and nominating eligible properties to the National Register. Nomination forms are prepared under the supervision of the State Historic Preservation Officer. The State Historic Preservation Officer establishes statewide priorities for preparation and submittal of nominations for all properties meeting National Register criteria for evaluation within the State. All nominations from the State shall be submitted in accord with the State priorities, which shall be consistent with an approved State historic preservation plan.

(b) The State shall consult with local authorities in the nomination process" (emphasis supplied).

C. The Court Of Appeals Impermissibly Expanded The Keeper's Role And Deprived New York State Of Meaningful Participation In The Nomination Process

In the instant case, the Keeper received the nomination -- without opinion -- from NYHP on August 12, 1993 and placed Coleman Station on the National Register several weeks later. The predicate nomination, however, was thereafter annulled in a State court proceeding. As the District Court ruled, this annulment voided the NYHP order ab initio, thus depriving the Keeper of the State nomination needed for the Keeper to list a property on the National Register. 36 C.F.R. § 60.1(b)(3). Because the State annulment took place after the National Register listing, the Keeper should have granted the delisting petition, without prejudice to further action by the Keeper when and if a nomination was thereafter resubmitted by NYHP. Tellingly, no such re-nomination has ever been made.

The Court of Appeals disagreed with the District Court, ruling:

> "When a nomination comes through a state historic preservation program, the regulations reserve final authority for the Park Service to determine whether the property will be added to the National Register. This reservation, combined with the Secretary of the Interior's power to name a property for listing sua sponte,

> strongly supports the inference that the Keeper has independent authority to determine whether a property should be listed, even where a nomination initially comes through a state preservation program. Indeed, the regulations require that even where there is a disagreement within a state program about a property's eligibility for listing, such nominations must be forwarded to the Keeper along with an explanation of the disagreement."

App. at 9a.

The plaintiffs respectfully submit that the Court of Appeals misinterpreted the respective roles of the State and the Keeper in the listing process. Congress intended that a State with an approved Program was to be treated as a full partner. Instead, the Court of Appeals has determined that the State's political and substantive input ends with the State's nomination to the Keeper, even if the State's nomination is ultimately annulled and the State thereafter refuses to re-nominate the property. The plaintiffs respectfully submit that certiorari should be granted so that this Court may more appropriately define the roles of the Keeper and the States in keeping with the intent of Congress.

More specifically, the above-quoted language from the Second Circuit's decision establishes that the Court of Appeals erred in three discernable respects. First, the nomination herein that came "through a state historic preservation program" was a flawed nomination because it failed to provide, inter alia, a written opinion on the issue of eligibility. A flawed nomination

is no nomination at all, especially where the nomination is thereafter formally annulled in a State court proceeding. The Keeper is powerless to act without a predicate State nomination. 36 C.F.R. § 60.1(b)(3).

Moreover, the Secretary's power to nominate a property for listing sua sponte under subsection (2) is a basis for limiting the Keeper's powers, not expanding them. The Secretary of the Interior -- a member of the President's Cabinet -- indeed has authority to name a property to the National Register if the Secretary deems that property to be of national significance. 36 C.F.R. § 60.1(b)(2). In contradistinction, the Keeper may only exercise her discretion as to nominations properly received from an authorized source, i.e., a State Historic Preservation Officer, a "person or local government" in a state without an approved Program, or the Federal Preservation Officer. 36 C.F.R. § 60.1(b)(3), (4) and (5). Finally, the Court of Appeals' observation that the Keeper may nominate a property to the National Register where there is a disagreement within a State Program also supports a limited view of the Keeper's powers. The relevant regulation is 36 C.F.R. § 60.6(l), which states:

> "If the State Historic Preservation Officer and the State Review Board disagree on whether a property meets the National Register criteria for evaluation, the State Historic Preservation Officer, if he or she chooses, may submit the nomination with his or her opinion concerning whether or not the property meets the criteria for evaluation and the opinion of the State Review Board to the Keeper of the National Register for a final decision on the listing of the property.

> The opinion of the State Review Board may be the minutes of the Review Board meeting. The State Historic Preservation officer shall submit such disputed nominations if so requested within 45 days of the State Review Board meeting by the State Review Board or the chief elected local official of the local, county or municipal political subdivision in which the property is located but need not otherwise do so. Such nominations will be substantively reviewed by the Keeper" (emphasis supplied).

The determination to forward a split nomination is within the sole discretion of the State Historic Preservation Officer, unless the Board or the chief elected local official demand that the nomination be forwarded. As such, the nomination does not reach the Keeper unless and until the Officer, the Board or the chief elected official so directs. The option to forward the nomination is reserved in the State, and acts as a limitation on the Keeper's power to list properties on the National Register. By affirming the Keeper's refusal to de-list the property, the Court of Appeals disregarded New York State's political check on the nomination process.

The Court of Appeals cited Stop H-3 Association v. Coleman, 533 F.2d 434 (9th Cir. 1976), as holding that a property may be named to the National Register absent State concurrence. Quoting the Ninth Circuit, the Court of Appeals stated:

> "'Whenever a city or state preferred a Federally-funded highway to an historic site, the local

> body can simply declare the site insignificant. Such a holding would be without precedent and would completely defeat Congress's clear attempt to protect such properties by passing the NHPA ...'"

App. at 11a.

While it is true that New York State could effectively bar a nomination from reaching the Keeper under subsection (3), the Secretary of the Interior (as opposed to the Keeper) could simply designate the property to be of national significance and add the property to the National Register sua sponte under subsection (2). By granting the Keeper this power as well, the Court of Appeals impermissibly expanded the Keeper's authority. Moreover, when New York State created an approved Program, it assured itself that no one other than the Secretary of the Interior could override "state priorities" as to the listing of a State property on the National Register. The Court of Appeals' ruling instead deprives New York State of any role in the listing process.

The plaintiffs argued below that the State annulment warranted delisting under § 60.15(a)(4), which authorizes removal where there is "[p]rejudical procedural error in the nomination or listing process." The Court of Appeals rejected this argument, stating:

> "Although prejudicial error in the nomination or listing process is a ground for removal from the national register, see, 36 C.F.R. § 60.15, we read this provision as relating to errors in the national

> nomination or listing process, not errors in the state nomination process" (emphasis in original).
>
> App. at 14a.

The plaintiffs respectfully submit that the Court of Appeals has missed the point. Even assuming that the Second Circuit's interpretation is correct (a point the plaintiffs do not concede), the State nomination herein was so severely flawed that it was annulled by the New York State Supreme Court. An annulled nomination is no nomination at all, especially where the basis for annulment was the absence of a written opinion as to eligibility for the National Register.

New York State has determined that the original nomination should be annulled and should not be resubmitted. The Court of Appeals disregarded the collective determination of New York State and affirmed the Keeper's refusal to delist the property. Such action denied New York State its statutory right to a substantive and political role in the listing process. If the Secretary of the Interior wishes to override the judgment of New York State he may do so, but such power is not vested in the Keeper, and may not be created at the expense of a State.

CONCLUSION

This case presents two issues of exceptional importance: the scope of the Keeper's authority to add property to the National Register, and the extent to which a State is entitled to political and substantive input in the listing process. If the opinion below is allowed to stand, the Keeper will be free to add State properties to the National Register without State concurrence. Moreover, as here, States will now be free to violate the substantive and procedural rights of property owners, knowing that a flawed or even an annulled nomination can result in a national listing. By granting the plaintiffs' petition for certiorari, however, this Court can correct the Second Circuit's decision, which improperly granted the Keeper extraordinary powers at the expense of the States.

Accordingly, the plaintiffs respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

GARY M. ROSENBERG
Counsel of Record
JEFFREY TURKEL

ROSENBERG & ESTIS, P.C.
Attorneys for Plaintiffs-Appellees
733 Third Avenue
New York, New York 10017
(212) 867-6000

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– against –

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APPENDIX

SW

St. Louis West, Inc. (8003)
NY (212) 684-3117 NJ (201) 863-8133
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Appendix A - Opinion of the United States Court of Appeals for the Second Circuit, Decided April 20, 1999 [Pages 1a - 17a]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 1998

(Argued January 25, 1999 Decided April 20, 1999)

Docket No. 98-6052

MOODY HILL FARMS LIMITED PARTNERSHIP, DOUGLAS DURST, SUSANNE DURST, RAYMOND MCENROE, FRANK S. PEROTTI, and DORIS PEROTTI,

Plaintiffs-Appellees,

—v.—

UNITED STATES DEPARTMENT OF THE INTERIOR, NATIONAL PARKS SERVICE,

Defendant-Appellant.

Before:

NEWMAN, WALKER, and CALABRESI,

Circuit Judges.

Appendix A
[Opinion of the USCA for the Second Circuit]

Appeal from the judgment of the United States District Court for the Southern District of New York (Robert W. Sweet, *District Judge*), granting summary judgment to plaintiffs-appellees on their claim that the Keeper of the National Register of Historic Places acted arbitrarily and capriciously, in violation of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, when she denied plaintiffs-appellees' petition to remove Coleman Station Historic District from the National Register.

Reversed and remanded for entry of judgment for defendant-appellant.

ROBERT W. SADOWSKI, Assistant United States Attorney (Mary Jo White, United States Attorney for the Southern District of New York, Gideon A. Schor, Assistant United States Attorney, on the brief) New York, NY *for Defendant-Appellant.*

GARY M. ROSENBERG, (Norman Flitt, Todd E. Soloway, Alan Garten on the brief) Rosenberg & Estis, P.C. New York, NY *for Plaintiffs-Appellees.*

NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES and PRESERVATION LEAGUE OF NEW YORK STATE (Paul W. Edmondson, General Counsel, Elizabeth S. Merritt and Edith M. Shine, Assistant General Counsel, National Trust for Historic Preservation, Washington, D.C.), filed a brief as *Amici Curiae in support of defendant-appellant.*

Appendix A
[Opinion of the USCA for the Second Circuit]

FRIENDS OF COLEMAN STATION, INC. (Whitney North Seymour, Jr. and Peter James Clines of Landy & Seymour, New York, NY) filed a brief as *Amicus Curiae in support of defendant-appellant.*

WALKER, *Circuit Judge*:

Plaintiffs-appellees, residents of the hamlet of Coleman Station in New York state, claimed in the United States District Court for the Southern District of New York (Robert W. Sweet, *District Judge*) that the Keeper of the National Register of Historic Places, an officer of the National Park Service, acted arbitrarily and capriciously, in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, when she denied plaintiffs-appellees' petition to remove Coleman Station Historic District from the National Register. After the district court granted summary judgment to plaintiffs-appellees, *see Moody Hill Farms Ltd. Partnership v. United States Dep't of Interior*, 976 F. Supp. 214, 222-23 (S.D.N.Y. 1997), the Park Service appealed.

At the heart of this case is a dispute between neighboring landowners about the future of Coleman Station, a hamlet in the Town of Northeast in Dutchess County, New York. Plaintiffs either are associated with Moody Hill Farms Limited Partnership, which operates a composting facility and organic farm on property within Coleman Station, or own farms within or adjacent to Coleman Station. The movement to list Coleman Station on the state and national registers of historic places was initiated by other landowners within Coleman Station who have made no secret of their opposition to Moody Hill Farms' composting activities, which they see as a threat to the district's traditional character.

Appendix A
[Opinion of the USCA for the Second Circuit]

In 1993, the latter group succeeded in obtaining listing for Coleman Station on the New York State Register of Historic Places. The New York State Office of Parks, Recreation and Historic Preservation ("NYHP"), pursuant to federal regulation, simultaneously nominated Coleman Station for listing on the National Register, and Coleman Station was placed on the National Register. Soon thereafter, plaintiffs challenged the New York listing on procedural grounds in state court and succeeded in having the listing removed. Plaintiffs then petitioned the Keeper to have the national listing annulled. After the Keeper denied their petition, plaintiffs filed the present suit, alleging violations of the APA and their due process rights.

With respect to the APA claim, the district court concluded that, because the criteria for the state and national registers are identical, eligibility for listing on the national register was destroyed once the state listing was voided. The district court further concluded that the procedural errors in the state listing contaminated the national nomination. Finally, the district court concluded that the Keeper erred in failing to consider an opinion by a Deputy Commissioner of the NYHP, forwarded along with plaintiffs' petition to remove Coleman Station from the National Register, that the property may lack historic integrity. The district court also denied summary judgment to defendant on plaintiffs' due process claim.

We disagree with the district court's conclusions regarding the APA claim. Because the Keeper has independent authority to determine the eligibility of properties and to add them to the National Register, the annulment of the state listing did not automatically void the national listing. Therefore, we reverse and remand for entry of judgment for defendant-appellant.

Appendix A
[Opinion of the USCA for the Second Circuit]

BACKGROUND

The National Historic Preservation Act of 1966, 16 U.S.C. § 470 *et seq.*, authorizes the Secretary of the Interior to expand and maintain a National Register of "districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering and culture." *Id.* § 470a(a)(1)(A). The regulations governing the procedures for listing properties on the National Register are set forth at 36 C.F.R. pt. 60. Properties may be added to the National Register in several ways, including nomination by an approved state historic preservation program, as in this case, or by a federal agency, by an individual in a state where there is no approved historic preservation program, by act of Congress or Executive Order, or by a declaration by the Secretary of the Interior. All nominations to the National Register, except those made by Act of Congress, Executive Order, or declaration by the Secretary of the Interior, must be approved by the Park Service. *See* 36 C.F.R. § 60.1(b).

On June 8, 1993, the New York State Review Board for Historic Preservation voted unanimously to nominate Coleman Station for listing on the state and national registers. The Review Board's decision was sent to the NYHP, New York's approved Historic Preservation Program, which, on August 12, 1993, approved the recommendation without written opinion and forwarded the nomination to the Keeper of the National Register. More than two months later, on October 25, 1993, property owners within the Coleman Station district received notification of the state listing.

On August 31, 1993, the Park Service published notice in the Federal Register that Coleman Station was under consideration for entry in the National Register. On September 30, 1993, Coleman Station was listed in the National Register, and the Park Service notified the NYHP of the national

listing. Approximately one year later, on December 30, 1994, the NYHP notified property owners within the district of the national listing.

Following the state listing, plaintiffs filed an Article 78 proceeding in the New York Supreme Court in Dutchess County. They sought an annulment on various grounds, including that the state listing was accomplished in violation of the procedures set forth at N.Y. Comp. Codes R. & Regs. tit. 9, § 427.5. These regulations provide, *inter alia*, that the NYHP must notify each owner of privately owned property of a decision relating to the listing of a property on the State Register no later than 45 calendar days after the decision has been made. *See id.* § 427.5(f)(1). The regulations also provide that the NYHP must issue its decision in writing, setting forth the findings in support of the decision. *See id.* § 427.5(d). By opinion dated June 29, 1994, the state court held for plaintiffs that the NYHP's failure to comply with these procedures vitiated the state listing. *See In re Moody Hill Farms Ltd. Partnership v. New York State Office of Parks, Recreation and Historic Preservation*, No. 94/0324, slip op. at 3-4 (N.Y. Sup. Ct. June 29, 1994). The state court did not reach the merits of whether Coleman Station met the criteria for eligibility for listing.

Plaintiffs then petitioned the Keeper to delist Coleman Station from the National Register. In conformity with the regulations set forth at 36 C.F.R. § 60.15(c), plaintiffs filed their petition with the NYHP, which reviewed the petition and, at plaintiffs' request, forwarded it to the Keeper. In a March 9, 1995, letter to plaintiffs, which was included with the materials sent to the Keeper, the NYHP set forth its analysis of the petition. Regarding the merits of Coleman Station's eligibility for listing, the letter noted that questions had been raised at the meeting of the State Review Board regarding the historic integrity of the district that "should be evaluated by

the Keeper of the National Register." Regarding the procedural errors in the state listing, the letter concluded that

> [t]he allegations in the petition about "procedural deficiencies" do not appear to be a basis for removal. The State Court in the proceeding referred to in the petition found that the Agency failed to follow certain procedures relating to the listing on the State Register. These procedural errors are not related to the listing of Coleman Station Historic District on the National Register. In response to the other procedural issues raised in the petition, the Agency sent out notices of the listing on the National Register on December 30, 1994, to all the property owners in the district; the federal rules do not require that notice be sent to property owners adjacent to a proposed district.

By letter dated August 18, 1995, the Keeper notified plaintiffs that their petition to remove Coleman Station from the National Register was denied. The Keeper reviewed and rejected each of plaintiffs' arguments. She explained that the district was worthy of listing according to the established criteria, and that the procedural errors in the state listing did not vitiate the national listing. Thus, although Coleman Station is no longer on the New York State Register of Historic Places, it remains on the National Register of Historic Places.

At a February 2, 1995 meeting, the New York State Review Board for Historic Preservation tabled a motion to re-nominate Coleman Station for state listing. Votes were insufficient to pass a motion to re-nominate or to definitively defeat one. At stake in this litigation appears to be the risk that, if the national listing is upheld, Coleman Station's state listing will be automatically restored without any further Board action. Under New York law, any property that is listed on, or even nominated to, the National Register is deemed listed on the

state register. *See* N.Y. Comp. Codes R. & Regs. tit. 9, § 427.1. Although national listing does not burden private landowners in any respect, and requires only that federal agencies take into account the effect of any proposed action on protected property, *see* 36 C.F.R. § 60.2(a), state listing may impose burdens on landowners within a district, such as requiring them to prepare an Environmental Impact Statement in order to obtain state approval for modifications, *see* N.Y. Comp. Codes R. & Regs. tit. 6, § 617 (setting forth regulations under New York's State Environmental Quality Review Act ("SEQRA"), N.Y. Envtl. L. § 8-101 *et seq.*).

DISCUSSION

I. *Plaintiffs' APA Claim*

Resolution of plaintiffs' APA claim turns on a single legal question: does the Keeper have independent authority to determine whether properties are eligible for listing on the National Register and to name them to the National Register without the agreement of a State's Historic Preservation Program?[1] We find that the Keeper does have such independent authority and that, therefore, plaintiffs' APA claim is without merit.

We begin by looking at the regulations governing the listing of properties on the National Register. These regulations establish five mechanisms for the listing of a property:

> (1) Those Acts of Congress and Executive orders which create historic areas of the National Park System administered by the National Park Service, all or

[1] For the purposes of this analysis, we will assume that the State Preservation Review Board's failure to re-nominate Coleman Station for listing on the state register after the state court's annulment of the first state listing amounts to a statement by the Board that, in its opinion, the district was not eligible for listing.

portions of which may be determined to be of historic significance consistent with the intent of Congress;

(2) Properties declared by the Secretary of the Interior to be of national significance and designated as National Historic Landmarks;

(3) Nominations prepared under approved State Historic Preservation Programs, submitted by the State Historic Preservation Officer and *approved by the NPS*;

(4) Nominations from any person or local government (only if such property is located in a State with no approved State Historic Preservation Program) *approved by the NPS* and;

(5) Nominations of Federal properties prepared by Federal agencies, submitted by the Federal Preservation Officer and *approved by NPS*.

36 C.F.R. § 60.1(b) (emphasis added). Where a nomination comes through a state historic preservation program, the regulations reserve final authority for the Park Service to determine whether the property will be added to the National Register.

This reservation, combined with the Secretary of the Interior's power to name a property for listing *sua sponte*, strongly supports the inference that the Keeper has independent authority to determine whether a property should be listed, even where a nomination initially comes through a state preservation program. Indeed, the regulations require that even where there is a disagreement within a state program about a property's eligibility for listing, such nominations must be forwarded to the Keeper along with an explanation of the disagreement. *See* 36 C.F.R. § 60.6(p).

Every circuit court to have considered the federal government's authority under the National Historic Preservation Act and related statutes to determine a property's eligibility for the National Register has concluded that the federal government is not bound by the determinations of local authorities. For example, in *Stop H-3 Association v. Coleman*, 533 F.2d 434 (9th Cir. 1976), the state of Hawaii planned to build a federally-financed highway through a valley that a private citizens' group sought to protect. The citizens' group petitioned the Secretary of the Interior to place the valley on the National Register. The Secretary determined that the valley was eligible for listing on the basis of its local historic and cultural value.

Subsequent to that determination, the Hawaii Historic Places Review Board, a state body responsible for evaluating and nominating Hawaiian properties for inclusion in the state and national registers, issued a finding that the valley was of only marginal local significance, a classification that would afford the valley no protection from destruction. *See id.* at 439-40. The question presented to the Ninth Circuit was whether the Secretary of the Interior (operating through the Keeper) had the authority to deem a property worthy of listing on the National Register on account of its state or local significance despite the state authorities' determination that the property was of marginal or no local significance. *See id.* at 441.

The Ninth Circuit upheld the authority of the Secretary. *See id.* at 441-43. Reviewing the history and purposes of the National Historic Preservation Act, the court noted that

> [t]he Act does not distinguish in any way between properties of "national" significance and those of "state or local" significance. There is nothing whatsoever in the Act or its legislative history to indicate that the Secre-

> tary may name some properties to the Register—those of importance in the history of a region, state, or locality—only after obtaining the concurrence of state and local authorities. For the purposes of the Register, properties of national, state, and local significance are treated equally. They are all deemed significant in *American* history, and they should be. If it should be held that the Interior Secretary has no power to determine that properties have state or local historic significance, there would, in our view, be a virtual nullification of the NHPA . . . . Only properties of "national" significance would have any lasting protection from destruction. Whenever a city or state preferred a Federally-funded highway to an historic site, the local body could simply declare the site insignificant. Such a holding would be without precedent and would completely defeat Congress's clear attempt to protect such properties by passing the NHPA . . . .

Id. at 441 n.13 (emphasis in original). The court concluded that

> [s]ince the Interior Secretary is the only official authorized to name properties to the National Register, we have no doubt that he has "jurisdiction" to determine whether properties have state or local historic significance. . . . Consequently, *the Interior Secretary's determination that [a particular site] is eligible for inclusion on the National Register as a site of local historic importance is not vitiated, and cannot be vitiated, by the State Review Board's finding that the [site] has only "marginal" significance.*

Id. at 441 (emphasis added).

In *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department*, 446 F.2d

1013, 1025-27 (5th Cir. 1971), the Fifth Circuit considered whether § 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. § 138, which applies to sites on or eligible for the National Register, gave the Secretary of Transportation final authority to determine a property's significance for purposes of whether the property should be protected from highway construction. As in *Stop H-3*, the case arose due to a city's expressed preference for a federally-funded highway over a park. The City Council had passed a resolution declaring the disputed property to be "of primary local significance as part of the right of way for the North Expressway and of secondary local significance as parts of park and recreation areas." *Named Individual Members*, 446 F.2d at 1025-26 (emphasis omitted).

The Fifth Circuit held that the City's preference was not relevant, because in enacting § 4(f) of the Transportation Act Congress had already determined that the decision between parks of local significance and federally-funded highways should not be in the hands of local authorities. *See id.* at 1026. The fact that the City Council did not consider the property to be of significance as a park was not determinative of whether it was protected. That decision rested with the Secretary of Transportation, who was directed by the Transportation Act to work in conjunction with the Secretary of the Interior and other agency heads to develop transportation plans that "include measures to maintain or enhance the natural beauty of the lands traversed." 23 U.S.C. § 138.

Plaintiffs do not cite any legal authority, contrary to *Stop H-3* and *Named Individual Members*, to support the proposition that local authorities have the final word on a property's eligibility for listing on the National Register. Instead, they rely on the argument that the procedural errors that occurred in the state listing process in this case render the national listing null and void. This argument assumes that the

national listing process incorporates state procedural requirements whenever a property is brought to the Keeper's attention by a state preservation program. We disagree.

Nothing in the federal regulations governing the procedural requirements concerning the listing of properties on the National Register supports plaintiffs' position that compliance with state procedural requirements is a predicate to national listing. These regulations provide, *inter alia*, that property owners within a district must be given at least 30 but not more than 75 days' notice of the state's intent to bring the nomination of a district before the State Review Board, and an opportunity to comment in writing. *See* 36 C.F.R. § 60.6(b),(d). Unless a majority of property owners objects by notarized statement to the nomination, notice that a property has been nominated for listing on the National Register must be published in the Federal Register within 45 days of the Keeper's receipt of the nomination. *See id.* § 60.6(r). If a majority of property owners objects, the Keeper must review the nomination and make a determination of eligibility within 45 days of receipt of the objection. *See id.* § 60.6(s). If the property is listed in the National Register, the State Historic Preservation Officer, the official charged with forwarding nominations to the Keeper, is required to inform the property owners of the listing. *See id.* § 60.6(u). The method of notification depends upon the number of property owners within the district. *See id.* There is no time limit, however, for when notification of listing on the National Register must be given.

The regulations also provide a mechanism for parties to petition the Keeper for the removal of a property from the National Register. *See id.* § 60.15. The grounds for removal include (1) the property no longer meets the criteria for listing due to loss or destruction; (2) additional information shows that the property does not meet the eligibility criteria;

(3) errors in professional judgment were made regarding eligibility; or (4) there was prejudicial procedural error in the nomination or listing process. *See id.* There is no time limit following the listing of a property on the National Register governing when a party may petition for its removal.

As the foregoing brief discussion suggests, these regulations establish a comprehensive set of procedural requirements that must be met for a property to be listed on the National Register upon the nomination of a state preservation program. However, nowhere in the regulations is there a requirement that state preservation programs also comply with *state* procedural requirements regarding nominations of properties for the national register. Although prejudicial error in the nomination or listing process is a ground for removal from the national register, *see* 36 C.F.R. § 60.15, we read this provision as relating to errors in the *national* nomination or listing process, not errors in the state nomination process. The effect of reading a requirement of compliance with state procedural rules into the federal scheme, it seems to us, would add unnecessary prolixity and could lead to a maze of disparate procedures for national listing from state to state. Accordingly, since there has been no allegation that the Park Service failed to comply with its own procedural requirements, plaintiffs' procedural argument must fail.

In the absence of any federal procedural failings, we do not find that the Keeper acted arbitrarily or capriciously, in violation of the APA, when she denied plaintiffs' petition to remove Coleman Station from the National Register on account of NYHP's failure to comply with state procedural requirements. Nor do we find that the Keeper failed to consider all relevant factors regarding the district's eligibility, including the purported opinion by the NYHP official who transmitted plaintiffs' removal petition to the Keeper that the district may lack historical integrity. We have reviewed the

letter that plaintiffs argue conveys this opinion and find the district court's observation that "[t]he letter stated that the boundaries may be defective and questioned the historic integrity of the district, the threshold requirement for National Register listing," 976 F. Supp. at 223, to be clear error. Rather than expressing an independent view regarding the district's integrity, the letter sets forth concerns that had been raised before the State Preservation Review Board, and recommends that the Keeper make an independent evaluation regarding the district's eligibility.

Finally, we reject plaintiffs' contention that the state procedural flaw, even if it does not require delisting in some cases, required delisting in this case in the absence of an affirmative federal finding of eligibility for federal listing. Once the federal listing occurred, plaintiffs had the opportunity to seek to persuade the Keeper that the property does not meet the eligibility criteria, and the Keeper's obligation, as we have noted, was to consider all relevant factors bearing on eligibility. The Keeper fulfilled this obligation. Though the end result is a national listing without an explicit finding of federal eligibility, that result does not contravene any federal requirement in a case such as this where the listing results from a state nomination, albeit one that was procedurally flawed.

II. *Plaintiffs' Contention Under the Due Process Clause*

Having determined that plaintiffs' APA challenge must fail, we turn to their contention that the district court's judgment should be upheld on the alternate ground that the Keeper's action violated their rights under the Due Process Clause. We have jurisdiction to consider any contention, supported by the record, that arguably supports the judgment. In exercising that jurisdiction, we may consider the legal sufficiency of the contention.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court outlined the concerns that a court must weigh in evaluating a due process challenge. It stated that the evaluation of a due process claim

> generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. "The first question in any due process inquiry is whether the plaintiff has a constitutionally protected interest." *DeMichele v. Greenburgh Cent. Sch. Dist. No. 7*, 167 F.3d 784, 789 (2d Cir. 1999). To succeed on a claim of a procedural due process violation, "a plaintiff must establish that state action deprived him of a protected property interest." *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 995 (2d Cir. 1997).

We reject plaintiffs' due process argument because national listing on its own does not impose any burdens on plaintiffs' use of their property. National listing constrains only the ability of departments of the federal government to take action affecting a listed property without first considering the effect of that action on the property. *See* 36 C.F.R. § 60.2(a); *Stop H-3*, 533 F.2d at 437-38; *Named Individual Members*, 446 F.2d at 1021-22. Plaintiffs have not alleged that this constraint on federal action implicates their property interests.

It is, rather, the burdens associated with listing on the New York register with which plaintiffs are concerned. These burdens include those imposed by New York's SEQRA and the

attendant risk that because plaintiffs' property is subject to regulation under SEQRA, it will be less valuable in securing credit from lenders. Federal law is relevant to this scheme only because New York automatically adds to its register of historic places any property nominated to or deemed eligible for listing on the National Register. *See* N.Y. Comp. Codes R. & Regs. tit. 9, § 427.1.

The fact that New York has chosen to tie its register to the national register, however, does not transform plaintiffs' due process claim—predicated on the burdens imposed by state law—into a due process claim against the National Park Service. In the absence of any allegation that national listing on its own imposes a burden that affects plaintiffs' property interests, plaintiffs' due process claim against this defendant must fail.

CONCLUSION

The judgment of the district court is reversed and the case is remanded for entry of judgment for defendant-appellant.

Appendix B – Opinion of the United States District Court for the Southern District of New York, Dated September 4, 1997 [Pages 18a – 39a]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MOODY HILL FARMS LIMITED PARTNERSHIP, DOUGLAS DURST and SUSANNE DURST, RAYMOND McENROE, FRANK S. PEROTTI and DORIS PEROTTI,

Plaintiffs,

-against-

UNITED STATES DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE,

Defendant.

OPINION

95 Civ. 11001 (RWS)

APPEARANCES:

ROSENBERG & ESTIS, P.C.
Attorneys for Plaintiffs
733 Third Avenue
New York, NY 10017
By: Norman Flitt, Esq.
Michael E. Lefkowitz, Esq.
Todd E, Soloway, Esq.
Of Counsel

HONORABLE MARY JO WHITE
United State Attorney for the
Southern District of New York
Attorney for Defendant
100 Church Street
New York, NY 10007
By: ROBERT W. SADOWSKI, ESQ.
Assistant US Attorney
Of Counsel

Appendix B
[Opinion of the USDC for the SDNY]

Sweet, D.J.

Plaintiffs Moody Hill Farms Limited Partnership, Douglas Durst, Susanne Durst, Raymond McEnroe, Frank S. Perotti and Doris Perotti, ("Plaintiffs"), have brought this motion pursuant to Rule 56(b), Fed. R. Civ. P., for summary judgment regarding their action pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 et seq., (the "APA"), challenging the denial by the Keeper of the National Register of Historic places (the "Keeper") of Plaintiffs' petition to remove the Hamlet of Coleman Station, ("Coleman Station"), from the National Register of Historic Places, ("National Register"). Defendant the National Park Service of the United States Department of the Interior, (the "NPS"), has also moved for summary judgment and, pursuant to Fed. R. Civ. P. 26(c), for denial of discovery.

For the reasons set forth below, the Moody Hill Plaintiffs' summary judgment motion is denied in part and granted in part, and the NPS' motion for summary judgment is denied.

Parties

Moody Hill Farms Limited Partnership ("Moody Hill") operates a composting facility and organic farm at its principal place of business in Coleman Station, a hamlet in the Town of Northeast in Dutchess County, New York. The property on which Moody Hill operates is included within the Coleman Station Historic District.

Douglas and Suzanne Durst are the owners of the

property upon which Moody Hill operates. Douglas Durst ("Durst") is also a partner in Moody Hill. Raymond McEnroe ("McEnroe") owns a two hundred acre farm, of which twenty-one acres are included within the Coleman Station Historic District. McEnroe is a partner with Durst in Moody Hill (collectively "Moody Hill Plaintiffs"). Frank and Doris Perotti (the "Perottis") own a farm adjacent to the Coleman Station Historic District.

The NPS administers the National Register, which lists districts, sites, buildings, structures and objects of historical, architectural, archeological, cultural and engineering significance.

Prior Proceedings

Plaintiffs filed the instant action on December 29, 1995, seeking judicial review of the Keeper's denial of its petition for removal of Coleman Station from the National Register. Plaintiffs allege that the denial was arbitrary and capricious because the Keeper failed to follow the regulatory requirements for designation of historic districts. In addition, Plaintiffs assert that notice of listing on the National Register was insufficient because the owners of property within the district were not notified until a year and a half after the listing took place, and the Perottis, who own property adjacent to the Coleman Station Historic District, were not notified of the listing at all. While no notice requirement exists under the National Historic Preservation Act ("NHPA"), Plaintiffs maintain that their right to timely, individual notification arises from the Due Process Clause of the Fifth Amendment.

Appendix B
[Opinion of the USDC for the SDNY]

On March 8, 1996, the Court ordered discovery to proceed. On May 3, 1996, the NPS moved simultaneously for summary judgment and for the denial of discovery. On August 20, 1996, the NPS' motions were denied.

On February 26, 1997, Plaintiffs filed this motion for summary judgment. The NPS also moved for summary judgment and oral argument was heard on May 7, 1997, at which time the motion was deemed fully submitted.

Facts

Coleman Station is a hamlet in the Town of Northeast in Dutchess County, New York. In February 1993, several local residents submitted an application to the National Register and the State Register requesting nomination of Coleman Station as a Historic District. It may be fair to infer that the organic fertilizing employed by Moody Hill did not endear the farm to its neighbors. The New York State Office of Parks, Recreation and Historic Preservation, (the "NYHP"), sent notice to property owners within the district, notifying them of the nomination to the State and National Registers, as required by federal regulations. 36 C.F.R. § 60.6(c).[1] The Moody Hill Plaintiffs submitted objections

[1] Section 60.6(c) of 36 C.F.R. states in relevant part:

> As part of the nomination process, each State is required to notify in writing the property owner(s) . . . of the State's intent to bring the nomination before the State Review Board. . . . The State shall send the written notification at least 30 but not more than 75 days before the State Review Board meeting. . . . The notice shall give the owner(s) at

regarding the nomination to the National and State Registers on the grounds that the area did not meet the necessary criteria.[2] In August 1993, the Deputy Commissioner of the NYHP approved Coleman Station for listing on the State

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least 30 but not more than 75 days to submit written comments and concur in or object in writing to the nomination of ouch property. . . . The National Register nomination shall be on file with the State Historic Preservation Program during the comment period . . . so that written comments regarding the nomination can be prepared.

[2] Criteria for National Register are set forth at 36 C.F.R. § 60.4, which states in relevant part:

National Register criteria for evaluation. The quality of significance in American history, architecture . . . and culture is present in districts, sites, buildings, structures and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and

(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) that are associated with the lives of persona significant in our past; or

(c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction . . .

Criteria used to determine suitability for State and National Register listings are identical. See 9 N.Y.C.R.R. § 427.3.

Appendix B
[Opinion of the USDC for the SDNY]

Register without written opinion, and forwarded the nomination to the Keeper.

On October 25, 1993, seventy-four days after the approval of Coleman Station for listing on the State Register, property owners within Coleman Station received notice that Coleman Station had been listed on the State Register. The Moody Hill Plaintiffs then filed an Article 78 proceeding in Supreme Court, Dutchess County, challenging the listing as arbitrary and capricious on three grounds: (1) Coleman Station did not meet the criteria for such a listing as established by the New York State Parks, Recreation and Historic Preservation Law; (2) notice of determination of the listing did not provide notice within the time required by the New York Code of Rules and Regulations, 9 N.Y.C.R.R. § 427.5; and (3) the decision had been issued without a written finding in support as required by the regulations. Id. On June 29, 1994, the New York Supreme Court, Dutchess County, granted Moody Hill's Article 78 proceeding and annulled the determination which listed Coleman Station on the State Register. The court based its decision on the violation of state regulations requiring timely notice and a written finding. In the Matter of the Application of Moody Hill Farms Limited Partnership v. New York State Office of Parks, Recreation and Historic Preservation, Dutchess Cty. Clerk's Index No. 0324/94, June 29, 1994 (Beisner, J.).

On August 19, 1994, the Moody Hill Plaintiffs received notice that the NYHP was considering renomination of Coleman Station as a historical district for both the State and National Registers. Because the Moody Hill Plaintiffs had not yet received notice that the National Register listing

had occurred, this letter reinforced their impression that their objections as to both listings would be considered. The Moody Hill Plaintiffs submitted written objections raising questions as to whether Coleman Station met the standards and criteria necessary for State or National Register listing.

Meanwhile, at the federal level, on August 31, 1993, the NPS published notice in the Federal Register that Coleman Station was being considered for entry on the National Register, as required by federal regulations. 36 C.F.R. § 60.16(a). On September 30, 1993, Coleman Station was listed on the National Register. Pursuant to federal regulations, notice of the listing was published in the Federal Register the same day and notice was sent to the NYHP, Id. § 60.13(b), who was responsible for notifying property owners within the district. Id. § 60.6(u).[3] The NYHP did not notify property owners of the National Register listing until December 31, 1994, seventeen months later. No notice was provided for adjacent property owners. Federal regulations do not impose any time limit for the State Agency to provide notice of listing on the National Register, nor do the regulations require provision of notice to owners of contiguous property.

In mid-January 1995, the NYHP notified the Moody

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[3] Subsection 60.6(u) states in relevant part:

> State Historic Preservation Officers are required to inform the property owners and the chief elected local official when properties are listed in the National Register . . . States which notify all property owners individually of entries in the National Register need not publish a general notice.

Hill Plaintiffs that it would consider their objections only as to nomination to the State Register, but not as to the National Register. At a hearing on February 2, 1995, the Board decided not to renominate Coleman Station to the State Register.

On February 28, 1995, Plaintiffs submitted a petition to remove Coleman Station from the National Register, pursuant to 36 C.F.R. § 60.15,[4] on grounds that: (1) the property did not meet the National Register criteria for evaluation; (2) there was an error in professional judgment as to whether the property meets the criteria for evaluation; and (3) there was prejudicial procedural error in the listing process. In support of the first two grounds, Plaintiffs alleged that the boundaries of the Coleman Station Historic District were defective and that Coleman Station lacked the "historical integrity" required by 36 C.F.R. § 60.4(a). In support of their assertion of prejudicial procedural error, Plaintiffs alleged that the seventeen month delay in notice to property owners

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[4] Section 60.15 states in relevant part:

Removing properties from the National Register. (a) Grounds for removing properties from the National Register are as follows: (1) The property has ceased to meet the criteria for listing in the National Register because the qualities which caused it to be originally listed have been lost or destroyed, or such qualities were lost subsequent to nomination and prior to listing; (2) Additional information shows that the property does not meet the National Register criteria for evaluation; (3) Error in professional judgment as to whether the property meets the criteria for evaluation; or (4)Prejudicial procedural error in the nomination or listing process. Properties removed from the National Register for procedural error shall be reconsidered for listing by the Keeper after correction of the error or errors. . . .

within the district and lack of notice to owners of adjacent property violated their procedural due process rights under the Fifth Amendment. The Plaintiffs also asserted that the National Register listing was voided by the New York State Supreme Court's annulment of the State Register listing and the NYHP's subsequent failure to renominate the district to the State Register.

Moody Hill's petition for removal was accompanied by a letter from the Deputy Commissioner for the NYHP, which stated that questions had been raised regarding the integrity of this district, and that an error in drawing the boundaries may have occurred.

On August 18, 1995, the Keeper denied the petition for removal. Regarding the eligibility of the historic district, she found that the nomination materials established eligibility for listing according to the criteria set forth in the federal regulations. Regarding the possibility that errors may have occurred regarding the boundaries of the district, as mentioned in the Deputy Commissioner's cover letter, the Keeper first noted that the Deputy Commissioner had not provided further information or a State opinion on the matter, and held that "As the record stands, we find no basis for professional error in delineating the boundaries for the historic district." Regarding the Plaintiffs' due process argument, the Keeper stated:

> [W]e do not understand [the State Court determination] to conclude that the State listing violated due process rights. Rather the opinion expressly concludes that the State listing process was invalid only because the state

failed to notify the property owners of the listing within the 45 days of the listing as required by 9 N.Y.C.R.R. 427.5(f)(1) and that the state failed to make an administrative finding as required by 9 N.Y.C.R.R. 427.5(d).

On December 29, 1995, the Moody Hill Plaintiffs and the Perottis filed this action seeking judicial review of the NPS' denial of the petition for removal. As an initial ground for reversal of the Keeper's decision, Plaintiffs again contend that their rights to procedural due process have been violated. They assert that listing Coleman Station on the National Register substantially affected their property right because the listing subjects their property to the strictures of the State Environmental Quality Review Act ("SEQRA"). Under SEQRA, an owner of property within or substantially contiguous to a National Historic Register district must submit an Environmental Impact Statement ("EIS") before taking any action on his or her property which involves approval or funding from a state or local agency. 6 N.Y.C.R.R. § 617.4(b)(9). According to Plaintiffs, imposition of SEQRA implicates their property interest, and therefore the delay in notice to property owners within the district and lack of required notice to adjoining property owners violated their procedural due process rights.

Second, Plaintiffs allege that Coleman Station was improperly nominated and listed. Plaintiffs assert that the Keeper overlooked prejudicial procedural error in the nomination to the National Register which occurred when the State Register listing was voided, thereby voiding the State Agency determination that the district met listing criteria.

According to the Plaintiffs, the State Agency determination is a necessary predicate to the National Register listing. Finally, Plaintiffs contend that the Keeper overlooked the fact that the district fails to meet the criteria for National Register listing.

Discussion

Summary Judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the court is not expected to resolve disputed issues of fact, Donahue v. Windsor Locks Board of Fire Commissioners, 834 F.2d 54, 57 (2d Cir. 1987), but to determine whether there are any factual issues which require a trial. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 585-87 (1986). The court must view the evidence in the light most favorable to the non-moving party. O'Brien v. National Gypsum Co., 944 F.2d 69, 72 (2d Cir. 1991). However, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts". Id. at –586.

A. An Issue of Fact Exists as to Whether Plaintiff's Property Interests are Implicated by Imposition of SEQRA

Plaintiffs claim that, independent of the procedures under the NHPA, timely and individual notification of listing on the National Register is required by the Due Process Clause. In order to assert a violation of procedural due process rights, Plaintiffs must "first identify a property right,

second show that the [government] has deprived him of that right, and third show that the deprivation was effected without due process." Local 342, Long Island Public Serv. Employees, UMD, ILA, AFL-CIO v. Town Bd. of Huntington, 31 F.3d 1191, 1194 (2d Cir. 1994); Irwin v. City of New York, 902 F. Supp. 442, 446-47 (S.D.N.Y. 1995). Property rights are not subject to due process protection unless the plaintiff has "more than a unilateral expectation of it. The plaintiff must, instead, have a legitimate claim of entitlement." Id. at 447 (quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)). "Property interest. are not created by the Constitution, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source, such as state law." Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538 (1985) (quoting Roth, 408 U.S. at 577). Because the property interest claimed here involves New York State regulation of land use, the existence and dimensions of the property interest should be determined by New York State Law.

New York law uses an entitlement analysis to determine if the benefit claimed by a plaintiff constitutes a property interest. Walz v. Town of Smithtown, 46 F.3d 162, 167-68 (2d. Cir. 1995); RRI Realty Corp. Inc. v. Village of Southampton, 870 F.2d 911, 918 (2d Cir. 1989). In applying the entitlement analysis test, the court must focus on the degree of official discretion exercised in granting or denying the claimed benefit. RRI 870 F.2d at 918. "The question can be particularly difficult in cases involving governmental regulation of the manner in which an owner may use his property." Sullivan v. Town of Salem, 805 F.2d 81, 84 (2d

Cir. 1986). Where the state agency retains full discretion to grant or deny the application, no property interest sufficient to invoke due process considerations is established. "An entitlement to a benefit arises only when the discretion of the issuing agency is so narrowly circumscribed as to virtually assure conferral of the benefit." Gagliardi v. Village of Pawling, 18 F.3d 188, 192 (2d Cir. 1994)(quoting RRI, 870 F.2d at 918).

Plaintiffs contend that protectible property rights are implicated by the listing in the National Register because such a listing subject any property within or adjacent to the historical district to the strictures of SEQRA, which was enacted in order to "incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of state, regional and local government agencies at the earliest possible time." To that end, SEQRA directs agencies to require an EIS for "actions they directly undertake, fund or approve." 6 N.Y.C.R.R. § 617.1(b). SEQRA sets forth a list of actions which automatically require the preparation of an EIS. Id. § 617.4. This list of "Type I Actions" includes any physical change made on property within or adjacent to a historical district listed on the State or National Register. Id. at § 617.4(b)(9)[5]

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[5] Section 617.4(b)(9) states that an EIS is required for:

> [A]ny Unlisted action (unless the action is designed for the preservation of the facility or site) occurring wholly or partially within, or substantially contiguous to any historic . . . site . . . that is listed on the National Register of Historic Places, or that has been proposed by the New York State Board on Historic Preservation for a recommendation to the State Historic Preservation Officer

In relevant part, SEQRA defines "action" as:

> (1) projects or physical activities, such as construction or other activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure that: (i) are directly undertaken by an agency; or (ii) involve funding by an agency; or (iii) require one or more new or modified approvals from an agency or agencies . . .

Id., § 617.2(b). SEQRA defines agency "approval" as "a discretionary decision by an agency to issue a permit, certificate, license, lease or other entitlement or otherwise authorize a proposed project or activity." In short, SEQRA affects actions to which some degree of agency discretion applies.[6]

Because the requirements of SEQRA are explicitly limited to actions subject to the exercise of agency discretion, initial application the New York entitlement analysis indicates that Plaintiffs do not hold a property interest in taking those actions free from SEQRA requirements. However, as discussed above, the Second Circuit has directed district courts to consider, not merely whether agency

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for nomination for inclusion in the National Register, or that is listed on the State Register of Historic Places.

[6] In addition to the SEQRA requirements, local regulations also require an EIS when property owns adjacent to or within a historical district build new structures or expand existing structures by more than fifty percent. Town of Northeast Code, Chapter 50, section 50-6.

discretion exists, but the scope of that discretion:

> By [the entitlement analysis] standard we did not intend to remove from constitutional protection every application for a license or certificate that could, under any conceivable version of facts, be the subject of discretionary action; a theoretical possibility of discretionary action does not automatically classify an application for a license or certificate as a mere "unilateral hope or expectation." On the contrary, our standard was intended to be a tool capable of measuring particular applications to determine if the applicant had a legitimate claim of entitlement based on the likelihood that without the due process violation that application would have been granted.

Sullivan, 805 F.2d at 85. Here, an issue of fact exists as to the scope of agency discretion regarding actions covered by SEQRA sufficient to defeat summary judgment for either party. Although by its terms, SEQRA only covers "discretionary" agency approval, the actual degree of discretion applied to the actions at stake for the Plaintiffs has not been addressed by the parties. As set forth above, where the scope of agency discretion is so limited that conferral of the benefit will almost automatically follow, the recipient retains a property interest in the benefit. See Walz, 46 F.3d at 168 (property interest exists in obtaining excavation permit because requirement for issue is merely a completed application); Brady v. Town of Colchester, 863 F.2d 205, 212-13 (2d Cir. 1988) (property interest in obtaining building permit where no requirements exist beyond application); Sullivan, 805 F.2d at 85 (if property complied with applicable state and municipal requirements, then "there was no element

of discretion or judgment remaining for the building official to exercise" in determining whether to grant benefit requested); Koncelik v. Town of East Hampton, 781 F. Supp. 152, 156-57 (E.D.N.Y. 1991) (property interest established in application for conforming subdivision where applicants had Satisfied all statutory requirements).

Until it is determined whether the imposition of SEQRA implicates a property interest, it cannot be determined whether procedural due process has been satisfied. Determination of the adequacy of due process protection proceeds according to a balancing test, as set forth in Mathews v. Eldridge, 424 U.S. 319 (1976). Once the court has identified the private interest affected by official action, it must determine the degree of protection required in order to satisfy procedural due process by balancing "the risk of an erroneous deprivation through the procedures used, and the probable value of additional procedural safeguards" against "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional . . . procedural requirement would entail." Mathews, 424 U.S. at 335. The amount of procedural protection required must be determined depending on the facts of the particular case. "The nature of the property or liberty interest at stake and the legal issues determine the kind of hearing required." Interboro Institute, Inc. v. Foley, 985 F.2d 90, 93 (2d Cir. 1993)[7]; see

[7] Historic Green Springs v. Bergland, 497 F. Supp. 839 (E.D.Va. 1980), on which Plaintiffs rely to establish a due process violation in the instant case, is inapposite; in Historic Green Springs, the court found a violation of procedural due process because the Interior Department had not yet published any procedural rules or substantive criteria for qualification of

also NLRB v. EDP Medical Computer Systems, Inc., 6 F.3d 951, 956 (2d Cir. 1993) (citing United States v. Monsanto, 924 F.2d 1186, 1192 (2d Cir. 1991) and Connecticut v. Doehr, 501 U.S. 1, 10 (1991)). At a minimum, procedural due process requires notice and an opportunity to be heard prior to deprivation of any property interest. NLRB, 6 F.3d at 956. That minimum has been met here as regards the Moody Hill Plaintiffs, who received notice of the nomination to the National Register in February and May 1993, and were given time to prepare objections which were forwarded to the NPS in August 1993. Whether this minimum meets the requirement of the specific case will depend on the as yet undetermined nature of the Plaintiffs' property interest.

The Perottis accurately assert that, as adjacent property owners, they received no notice or hearing, yet their property is identically affected by SEQRA. Whether the Perottis' due process rights were therefore violated again depends on whether a property interest is implicated by the imposition of SEQRA.[8]

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a historic district.

[8] The Perottis' position differ. from that of the Moody Hill Plaintiffs because the NPS itself took no action as to the Perottis' property; the imposition of SEQRA is entirely a result of State law. It is possible that, for the Perottis, suit against the NPS is inappropriate to address an injury imposed only by State law.

B. The Keeper's Denial of Plaintiffs' Petition to Remove Coleman Station from the National Register was Arbitrary and Capricious

> A successful challenge to an agency's decision under the arbitrary and capricious standard must clearly demonstrate that the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem or offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. "

Soler v. G. & U. Inc., 833 F.2d 1104, 1107 (2d Cir. 1987) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). In making this determination, the court may not substitute its judgment for that of an agency. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); State of New York Dep't of Social Services, 21 F.3d at 492. The "arbitrary and capricious" standard includes both procedural and substantive defects:

> Procedurally, an agency's decision can be "arbitrary and capricious" if it was not the product of the requisite processes. That is, regardless of the merits of the actual decision, a Court can remand a decision to an agency for further consideration if the agency did not adequately consider all the viewpoints which it was required to consider. Substantively, the "arbitrary and capricious" standard requires the reviewing Court to reject the findings

> of the agency if they were not based on consideration of relevant factors, or if there was a clear error of judgment.

U.S. v. Dist. Council of NYC & Vicinity of Carpenters, 880 F. Supp. 1051, 1066 (S.D.N.Y. 1995) (citations omitted) (Haight, J.).

Before determining whether the Keeper's dismissal was arbitrary and capricious, it is necessary to examine the complex of regulations governing a nomination to the National Register. Properties are added to the National Register by the State Agency responsible for historic preservation. 36 C.F.R. § 60.1(b).[9] The State Agency Officer, in this case the Commissioner of the NYHP, must determine that the nomination application is "in conformance with National Register criteria" before submitting the nomination package to the Keeper. Id. at § 60.6(k),[10] (o).[11] If this

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[9] Individual citizens may not apply for nomination to the National Register independently unless there is no State historical preservation agency. Id.

[10] Section 60.6(k) also states:

> All comments received by a State and notarized statements of objection to listing are submitted with a nomination.

[11] Section 60.6(o) states:

> The State Historic Preservation Officer signs block 12 of the nomination form if in his or her opinion the property meets the National Register criteria for evaluation. The State Historic Preservation Officer's signature in block 12 certifies that: (1) all procedural requirements have been met; (2) The nomination form is adequately documented;

determination is reached without controversy, the State Officer signs "Block 12" to certify compliance with listing criteria. If the Officer and Board of the State Agency disagree as to whether the area meets National Register criteria, the nomination may be submitted by the Officer alone, or by request of the Board or the chief elected official. Id. at § 60.6(1).[12] If the nomination has been so disputed, the Officer must sign a continuation sheet stating his/her opinion on the eligibility of the property. Id., at § 60.6(p).[13] In sum, a nomination to the National Register does not proceed unless either the State Agency Officer or Board find that it meets federal criteria. If that finding is disputed, the State Officer must submit a written opinion on eligibility.

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(3) The nomination form is technically and professionally correct and sufficient; (4) In the opinion of the State Historic Preservation Officer, the property meets the National Register criteria for evaluation.

[12] Section 60.6(1) states in relevant part:

If the State Historic Preservation Officer and the State Review Board disagree on whether a property meets the National Register criteria for evaluation, the State Historic Preservation Officer, if he or she chooses, may submit the nomination with his or her opinion concerning whether or not the property meets the criteria for evaluation and the opinion of the State Review Board to the Keeper of the National Register for the final decision on the listing of the property . . .

[13] If the State Agency personnel agree that the nomination fails to meet the criteria for National Register and should not be forwarded, "[a]ny person or local government may appeal to the Keeper the failure or refusal . . . to nominate the property". Id. § 60.12(a).

Appendix B
[Opinion of the USDC for the SDNY]

In the instant case, the Assistant Commissioner of the NYHP listed the district on the State Register and forwarded the nomination to the National Register on the same day, certifying as to its eligibility by signing the application form. As a result of the State Court proceeding, the nomination to the State Register became void ab initio. Subsequently, the NYHP decided not to renominate the district for the State Register. Implicit in this decision is the determination that the district does not meet the criteria for the State Register. Because the criteria for State and National Registers are identical, eligibility for National Register is also refuted. Thus, the certification of eligibility to the National Register, which resulted from the original nomination of the district, appears to have been voided by the State Court annulment, and was not re-established thereafter.

As part of the petition to delist, the Deputy Commissioner of the NYHP submitted a letter expressing his views on removal of the district, as required by 36 C.F.R. § 60.15. The letter stated that the boundaries may be defective and questioned the historic integrity of the district, the threshold requirement for National Register listing. This letter, in conjunction with the voiding of the NYHP's certification of eligibility, indicates that an error in professional judgment occurred as to eligibility. The Keeper failed to consider that possibility. Instead she suggested that "If the State believes an error has occurred and that nomination documentation should be revised to reflect a boundary alteration, it is incumbent upon the State to request such acts and to provide documentation supporting any change." The Keeper was apparently referring to 36 C.F.R. §

60.14, which governs alterations in district boundaries. However the Deputy Commissioner's letter had nothing to do with suggestions of alteration. It was submitted pursuant to § 60.15(e), an entirely different provision, which requires a written opinion regarding the removal of a listed district altogether. The Keeper should have considered the Deputy Commissioner's opinion regarding the lack of historical integrity as evidence of professional error, supporting delisting. Because she failed to do so, the Keeper's determination was "not based on consideration of relevant factors." Dist. Council of Carpenters, 880 F. Supp. at 1066.

Conclusion

For the reasons set forth above, summary judgment is denied as to the sufficiency of due process. Summary Judgment is granted as to the Plaintiffs' claim that the Keeper's denial of their petition to delist was arbitrary and capricious. That denial is reversed, and the case will be remanded upon resolution of the due process question.

It is so ordered.

New York, N. Y.
September 4, 1997

ROBERT W. SWEET
U.S.D.J.

Appendix C – Decision and Order of the Supreme Court of the Sate of New York, ("SCSNY"), County of Dutchess (Beisner, J.), Dated June 29, 1994 [Pages 40a – 44a]

Short Form Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

X

In the Matter of the Application of
MOODY HILL FARMS LIMITED PARTNERSHIP,

Petitioner,

For a Judgment Pursuant to Article 78 –
of the Civil Practice Law and Rules,

Index No.
94/0324

-against-

NEW YORK STATE OFFICE OF PARKS,
RECREATION AND HISTORIC PRESERVATION,

Respondent.

X

BEISNER, J.

THE FOLLOWING PAPERS READ ON THIS PETITION pursuant to CPLR Article 78 seeking judgment annulling the determination of the respondent which listed Coleman Station Historical District on the New York State Register of Historic Places and nominated Coleman Station for listing on the National Register of Historic Places or, alternatively, directing respondent to remove Moody Hill Farms from the Coleman Station Historic District listing.

Appendix C
[Decision and Order of the SCSNY, County of Dutchess]

	PAPERS NUMBERED
NOTICES OF PETITION/PETITION	1-2, 1-14
AFFIDAVITS	A-F
EXHIBITS	1-11, 1-11, 1-2
ANSWER OF RESPONDENT	1-11, 1-11, 1-2
EXHIBIT	1-18
MEMORANDUM OF LAW	
EXHIBITS	2
ANSWERING AFFIDAVITS	
EXHIBITS	
REPLYING AFFIDAVITS	1-12
EXHIBITS	
MEMORANDUM OF LAW	1-16

UPON THE FOREGOING PAPERS IT IS ORDERED AND ADJUDGED THAT THE PETITION is granted and respondent's determination of August 12, 1993 which listed Coleman Statement Historic District on the New York State Register of Historic Places is annulled.

The petitioner, Moody Hill Farms Limited Partnership (Moody Hill Farms), operates a composting facility at its principal place of business in the hamlet of Coleman Station, Town of Northeast, Dutchess County. This property has been listed as part of the Coleman Station Historic District on the New York State Register of Historic Places. Petitioner brings this petition on the ground that the determination was arbitrary, capricious and contrary to law, and on the ground that the respondent did not follow proper procedure in making its determination. Because, for the reasons which follow, the

court agrees that respondent failed to follow the procedures set forth in 9 NYCRR:427.5, the petition is granted and respondent's determination is reversed and annulled.

Pursuant to 9 NYCRR 427.5(f)(1), no later than 45 calendar days after the commissioner makes a decision relating to the listing of a property on the State Register, the commissioner must notify the appropriate APO and/or municipal official and each owner of privately owned property at his last known address, publish a notice of the decision in a newspaper of general circulation in the area where the property is located, and publish a notice of the listing in the Register. It is undisputed that respondent did not notify the property owners until approximately five months after the decision and did not publish a notice of decision in a newspaper of general circulation in the area where the property is located. Even if the court were to accept respondent's argument that the petitioner, who is not an owner of affected real property, cannot raise the issue of respondent's late notification to owners, respondent concededly failed to publish a notice of the decision in a newspaper of general circulation. There is no merit to respondent's claim that the fact that local newspapers published several articles about the listing is the functional equivalent of the publication requirement set forth in 9 NYCRR 427.5(f)(1)(ii). The rules of an administrative agency, duly promulgated, are binding upon the agency as well as upon any other person who might be affected (Matter of Epstein v. Valenti, 97 AD2d 881, 882). While the courts will generally defer to an agency's interpretation of its regulations, it is also axiomatic that an agency is bound by the language of its own regulation and cannot construe it in such

a manner that the plain language on the face of the regulation is rendered meaningless (Matter of Duflo Sorav-Chemical, Inc., v. Jorling, 153 AD2d 244, 247).

In addition, 9 NYCRR 427.5(d) requires that the commissioner issue his decision, with an appropriate finding in support, in writing. Respondent states that the commissioner's execution of the national nomination form satisfies this requirement. Absent at least a statement of the commissioner that the contents of the national nomination form constitute his findings, respondent's interpretation renders 9 NYCRR 427.5(d) meaningless.

Because of respondent's failure to comply with the requirements set forth in 9 NYCRR 427.5, the petitioner must be granted. In light of this determination, the court will not address the other arguments which petitioner has raised.

Respondent's answer raises several affirmative defenses which the court finds to be without merit. Respondent first asserts that petitioner lacks standing to bring this proceeding. It is undisputed that petitioner operates a composting facility pursuant to a permit issued by the New York State Department of Environmental Conservation on property included in Coleman Station Historic District. Petitioner's status as a tenant rather than an owner is not an impediment to its right to maintain this proceeding (Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of the Town of North Hempstead, 68 NY2d 406, 414-415). Since the property in which petitioner has a possessory interest is located within the historic district at issue, petitioner is presumptively adversely affected by respondent's

Appendix C
[Decision and Order of the SCSNY, County of Dutchess]

determination (Matter of Har Enterprises v. Town of Brookhaven, 74 NY2d 524, 526).

Respondent's claim that the petition is untimely must also be rejected. The four month statute of limitations does not begin to run until the aggrieved party is notified of the determination (Matter of Edmead v. McGuire, 67 NY2d 714, 716). Respondent did not notify the property owners of the determination until October 25, 1993, which is the earliest date the statute of limitations began to run. Thus, petitioner's commencement of this proceeding in late January 1994 is timely.

Finally, Respondent argues that petitioner has failed to exhaust his administrative remedies. Since there is no provision for administrative review of the determination at issue, this argument is without merit.

Dated: June 29, 1994

RALPH A. BEISNER, J.S.C.

TO: Rosenberg & Estis, P.C.
Attorneys for Petitioner
733 Third Avenue
New York, New York 10017

G. Oliver Koppel
Attorney General of the
State of New York
Attorney for Respondent
New York State Department of Law
The Capitol
Albany, NY 12224

Appendix D – Determination of the United States Department of the Interior, National Park Service, Dated August 8, 1995 [Pages 45a – 52a]

UNITED STATES DEPARTMENT OF THE INTERIOR

NATIONAL PARK SERVICE
P.O. BOX 57127
WASHINGTON, DC 20013-7127

August 18, 1995

Allen Acklin
P.O. Box 422
Millerton, New York 12546

Re: Coleman Station Historic District, Dutchess County, New York

Dear Petitioner:

A petition for the removal of the Coleman Station Historic District, Dutchess County, New York, was forwarded to the National Park Service by J. Winthrop Aldrich, Deputy Commissioner for Historic Preservation, and received on April 19, 1995. Further documentation on the case was forwarded by the State's Counsel Megan Lesser Levine and received on May 1, 1995. Additional documentation and/or correspondence has been received as recently as August 14, 1995. After careful consideration of all pertinent documentation of record in this case, we conclude that there are no grounds for the removal of the Coleman Station Historic District from the National Register in accordance with Federal program regulations, 36 CFR 60.15. Therefore, the petition for removal is denied and the Coleman Station Historic District remains listed in the National Register.

Appendix D
[Determination of the USDI]

registered in the National Register under Criteria A and C for its local historic and architectural importance in the areas of agriculture, architecture, exploration and settlement, and industry. The property is listed as an intact rural historic district comprised of nine historic farms that retain their traditional spatial relationships and significant concentrations of historic buildings, sites, structures, and landscape features reflecting the district's historic agricultural evolution from the mid-eighteenth century through the mid-twentieth century.

The petition suggests that the nomination documentation does not demonstrate adequate research to establish the significance or the level of integrity of the historic district and does not address the individual National Register criteria specifically or in satisfactory depth.

I consider that the nomination provides a sufficient historical overview of the history of the district under the areas of significance previously mentioned. The documentation provides a suitable bibliography and endnote references supporting these historic contexts. Inherent in the discussion of these historic contexts the nomination documentation supports the historic district's eligibility under Criteria A and C. The documentation substantiates the importance of the broad patterns of Coleman Station's agricultural development over the historic continuum of its period of significance under Criterion A. The property inventory and descriptive information and the photographs of the district elucidate the assembly of significant vernacular and regional property types and the agricultural lands included within the district and provide the framework for understanding their collective importance and their state of preservation. This documentation supports the eligibility of the historic district under Criterion C and that the district has sufficient physical integrity for listing in the National Register.

Appendix D
[Determination of the USDI]

The petition asserts that there was procedural error in the National Register listing process because adjacent property owners received no notification of the proposed nomination and because property owners within the district were not notified of the completed listing by the Keeper of the National Register. National Register regulations do not require notification of adjacent property owners per se of a pending listing. However, general notice of a pending nomination is made by publication in the Federal Register as required by 36 C.F.R. § 60.13. Such notice was published for the Coleman Station Historic District on August 31, 1993.

Once a property is listed in the National Register, the National Park Service notifies the State, which, in turn, is responsible for notifying property owners of the listing pursuant to 36 C.F.R. § 60.6(u). No time limit for such notification is prescribed by the regulations. Individual property owners were notified by the State Historic Preservation Office in writing of the district's listing in the National Register on December 30, 1994. Notification of owners of properties adjacent to National Register listed properties is not required by the National Register regulations.

The petition also generally asserts that the "violation of due process rights found by Justice Beisner" in a ruling concerning the listing of the district in the New York State Register" should also be effective to annul the listing of Coleman Station from the National Register of Historic Places. However, we do not understand Justice Beisner's June 29, 1994, opinion and order entered In the Matter of the Application of Moody Hill Farms Limited Partnership to conclude that the State listing violated due process rights. Rather, the opinion expressly concludes that the State listing

Appendix D
[Determination of the USDI]

process was invalid only because the State failed to notify the property owners of the listing within 45 days of the listing as required by 9 NYCRR 427.5(f)(1) and that the State failed to make an administrative finding required by 9 NYCRR 427.5(d).

In his letter to petitioners of March 9, 1995, that was transmitted with the petition for removal to the National Park Service, Deputy Commissioner Aldrich states that the petition, in reference to the meeting of the State Board for Historic Preservation held on February 2, 1995, during which the renomination of the property to the State Register was considered, raises questions about the integrity of the district and that an error in drawing the boundaries may have occurred. He concludes that "...thus, errors in creating the boundary of the historic district may have occurred and should be evaluated by the Keeper of the National Register." Deputy Commissioner Aldrich did not provide further information or a State opinion on this matter. If the State believes an error has occurred and that nomination documentation should be revised to reflect a boundary alteration, it is incumbent upon the State to request such action and to provide documentation supporting any change. As the record stands, we find no basis for professional error in delineating the boundaries for the historic district.

As stipulated in National Register Bulletins # 16, *How to Complete the National Register Registration Form,* and # 30 *Guidelines for Evaluating and Documenting Rural Historic Landscapes,* various viable approaches to boundary definition are reasonable and acceptable. Frequently several approaches are combined in delineating the boundary of a large historic district. This is often the case in rural historic districts or archeological districts encompassing large acreage. The petition argues that "the proposed district is ineligible for

Appendix D
[Determination of the USDI]

listing because its geographic extent is not defined by the requisite boundaries clearly distinguishing it from the area which surrounds it."

The nomination documentation describes that, in general, the "rough
limits of the community can be determined by visual and functional factors of its geography," and that the approximate 700 foot elevation ridgeline on the east, south, and west forms an effective visual container for the localized landscape within the larger geographical context of the Oblong Valley. Further, the nomination more narrowly justifies the precise historic district boundary as a combination of historic land use and ownership patterns to include core area farms associated with some of the hamlet's early settlement families, namely the Wheelers, the Collins, and the Dakins (Colemans), and later properties that reflect the district's agricultural evolution through the coming of the Harlem Valley Railroad in 1852, and into the early-mid twentieth century.

The Coleman Station Historic District boundary reasonably excludes such entities as modern residential development; historic farmland straddling the New York/Connecticut border (because half of the farm's historic acreage and buildings are located in Connecticut); and properties to the north and south that appear more closely related to the historical development of the town of Northeast Center to the northwest and Sharon Station to the south of the district, respectively. The petition suggests that other properties outside the Coleman Station Historic District may possibly reflect similar historical development within a larger context as those within the district, and it concludes that this renders the Coleman Station boundaries indefensible. The existence of other potentially significant historic properties in the larger

Appendix D
[Determination of the USDI]

geographic context of the Oblong Valley area as a whole is acknowledged in the nomination documentation; however, this does not negate the eligibility of the Coleman Station Historic District within the local, community-based context presented.

National Register guidelines state that whatever the approach to boundary definition, "boundaries must be fixed in space and capable of accurate description by metes and bounds, legal descriptions, lines appearing on USGS topographical maps, or site plans drawn to scale." The Coleman Station Historic District boundary meets this test as well.

We realize this is not the decision you were seeking in pursuing this petition for removal of the Coleman Station Historic District from the National Register. However, we assure you that after careful consideration, the facts presented in this case merit no other conclusion. In accordance with National Register regulations, 36 CFR 60.15(l), this is the final administrative decision on your petition.

Sincerely,

Carol D. Shull
Keeper of the National Register of Historic Places
Interagency Resources Division

cc: Senator Alfonse M. D'Amato
United States Senate
Washington, DC 20510-3202

Appendix D
[Determination of the USDI]

Senator Daniel P. Moynihan
United States Senate
Washington, DC 20510-3201

Honorable Gerald B. Solomon
House of Representatives
Washington, DC 20515-3222

Honorable Sue W. Kelly
House of Representatives
Washington, DC 20515-3219

Kenneth Duncan
Duncandale Farm Inc.
R.D. #2, Box 343
Millerton, NY 12546

Douglas Durst
1133 Avenue of the Americas
New York, NY 10036

Mr. Michael Lefkowitz
Rosenberg & Estis, P.C.
733 Third Avenue
New York, NY 10017

Robert C. Quinlan
President
Citizens for North East, Inc.
R.D. 2, Box 361
Millerton, NY 12546